SUPREME COURT OF QUEENSLAND

CITATION:	*R v Lennox; R v Lennox; Ex parte Attorney-General (Qld)* [2018] QCA 311
PARTIES:	**In CA No 97 of 2018:** **R** **v** **LENNOX, James Ronald** (appellant) **In CA No 127 of 2018:** **R** **v** **LENNOX, James Ronald** (respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (appellant)
FILE NO/S:	CA No 97 of 2018 CA No 127 of 2018 DC No 2585 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction Sentence Appeal by Attorney-General (Qld)
ORIGINATING COURT:	District Court at Brisbane – Date of Conviction: 19 April 2018; Date of Sentence: 23 April 2018 (Dick SC DCJ)
DELIVERED ON:	Date of Orders: 31 October 2018 Date of Publication of Reasons: 13 November 2018
DELIVERED AT:	Brisbane
HEARING DATE:	18 September 2018
JUDGES:	Philippides and McMurdo JJA and Henry J
ORDERS:	**Orders delivered 31 October 2018:** **1. Appeal allowed.** **2. Conviction on count 4 quashed.** **3. Verdict of acquittal on count 4 entered.** **4. Attorney-General's appeal against sentence dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – GENERAL PRINCIPLES – MISCARRIAGE OF JUSTICE – where the appellant was convicted by a jury of rape and sentenced to four and a half years' imprisonment suspended

after 14 months – where the appellant was acquitted on counts of sexual assault for episodes which occurred before and after the rape – where the appellant appeals on the basis of inconsistent verdicts – whether the inconsistency complained of requires the conviction to be set aside to prevent a possible injustice

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – OTHER MATTERS – where the appellant appeals on the grounds of directions not given as to the use to which the jury might put lies told by the appellant other than those in his interview with police – where the appellant lied in his recorded interview with police – where further lies the appellant told the complainant in endeavouring to cultivate a relationship with her were relied upon – where the need for the direction was raised before, and considered and rejected by, the learned trial judge – whether the learned trial judge erred in not so directing

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – OTHER MATTERS – where the the complainant's evidence was read in response to a jury redirection request without directions, warnings or re-reading of the appellant's evidence – whether the learned trial judge erred in doing so

Criminal Code (Qld), s 348(1)

Black v The Queen (1993) 179 CLR 44; [1993] HCA 71, cited
Edwards v The Queen (1993) 178 CLR 193; [1993] HCA 63, cited
Gately v The Queen (2007) 232 CLR 208; [2007] HCA 55, distinguished
GAX v The Queen (2017) 91 ALJR 698; (2017) 344 ALR 489; [2017] HCA 25, cited
KRM v The Queen (2001) 206 CLR 221; [2001] HCA 11, cited
MacKenzie v The Queen (1996) 190 CLR 348; [1996] HCA 35, followed
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
Osland v The Queen (1998) 197 CLR 316; [1998] HCA 75, cited
Pillay v The Queen (2014) 43 VR 327; [2014] VSCA 249, cited
R v GAW [2015] QCA 166, cited
R v Kirkman (1987) 44 SASR 591, cited
R v LAK [2018] QCA 30, distinguished
R v R,GJ (2009) 105 SASR 506; [2009] SASC 371, cited
R v Stone, unreported, Court of Criminal Appeal, Devlin J, 13 December 1954, cited
Zoneff v The Queen (2000) 200 CLR 234; [2000] HCA 28, cited

COUNSEL: B Power for the appellant

M R Byrne QC for the respondent

SOLICITORS: Bannisters for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **PHILIPPIDES JA:**

Summary

[2] The complainant first met the appellant on the afternoon of 23 January 2016 when he offered her a lift. Later that evening, they went on a date. They met up again the following evening. The five counts of sexual offending against the complainant arise out of an incident alleged to have occurred on that evening and related to sequential acts.

[3] There was no dispute that the acts the subject of counts 1 to 4 occurred. The real issues at trial concerning those counts was whether the prosecution had proved beyond reasonable doubt that the complainant had not consented to the charged acts and, if it had not, whether the prosecution had excluded beyond reasonable doubt the defence of honest and reasonable but mistaken belief as to consent on the part of the appellant pursuant to s 24 of the *Criminal Code* (Qld) (the Code). The jury acquitted the appellant of two counts of unlawful and indecent assault, that he touched the complainant's breasts (count 1) and sucked her breasts (count 2). The jury were unable to agree on a verdict in relation to count 3, a charge of rape by digital penetration of the complainant's vagina. However, the jury found the appellant guilty of a further count of rape, penile penetration of the complainant's vagina (count 4), which is the subject of this appeal.

[4] As to count 5, charged that the appellant procured the complainant to masturbate him, the appellant was found not guilty.

[5] The appellant appeals his conviction on count 4 on three grounds, the first being that the verdict of guilty of rape was inconsistent with the verdicts of acquittal.

[6] I have had the advantage of reading the reasons of Henry J and the additional reasons of McMurdo JA that this Court should intervene to set aside the conviction of rape and order an acquittal in lieu on the ground of inconsistent verdicts, that is, that the jury's verdicts are illogical and irrational. I take a different view.

[7] For the reasons that follow, I do not consider that the high bar for appellate intervention set by the relevant High Court authorities is reached in this case, so as to warrant this Court's interference to set aside the verdict of guilty of rape on the ground that the verdicts returned by the jury demonstrate such inconsistency that no reasonable jury, applying their minds properly to the facts, could have arrived at them.

[8] In my view, the acquittals on counts 1 and 2 are properly able to be reconciled with the verdict of guilty on count 4. The acquittals on the lesser serious counts may be understood on the basis that the jury gave the appellant the benefit of a doubt as to whether guilt had been proved in regard to the element of consent and having regard to the defence of mistake as to consent, rather than that they rejected the

complainant's evidence. Because of the difference in the quality of her evidence, the jury were entitled to reach a different conclusion as to the count of rape.

[9] Further, for the reasons identified by McMurdo JA, the verdict of not guilty on count 5 cannot be said to be unacceptably inconsistent with the verdict of guilty on count 4.

[10] Given that my view that the ground of appeal alleging inconsistency is unfounded is in the minority, it is not necessary for me to consider the Attorney-General's appeal against the sentence imposed (four and a half years imprisonment, suspended 14 months with an operational period of five years).

Ground 1 – inconsistent verdicts

[11] In order to explain my reasoning as to ground 1 of the appeal, whether the jury's conviction was inconsistent with the acquittals (on counts 1, 2 and 5) so as to require this Court to intervene, it is necessary to set out the relevant evidence.

Evidence

The complainant's evidence in chief

[12] The complainant was from Hong Kong and had been living in Australia for a little over a year on a working visa. She was 27 years old at the time of the events in question and working as a nanny.

[13] On the afternoon of Saturday, 23 January 2016, at about 2.00 pm, the complainant was waiting alone at a bus stop to take a bus to the library at the Carindale Shopping Centre. The complainant described how a car drove past her, stopped and then drove back and the driver (the appellant) asked if she was going to the shopping centre and offered her a lift, which she accepted. There was a discussion in the vehicle; the complainant told the appellant she was a student and the appellant said he was an engineer. The appellant asked the complainant if she wanted to go out with him that night and they exchanged phone numbers. The appellant also asked the complainant if he could take a photo of them together, which he did.

[14] They met again that evening at about 7.00 pm at the same bus stop. The appellant drove to Mt Gravatt and then to Mt Coot-tha to see the view. He then looked at the weather report and said that a storm was coming and that he needed to go to his Sunnybank home to do some things to protect it from the storm. The complainant sat in the car outside a house, which she assumed was the appellant's house at Sunnybank, while the appellant left for 10 minutes or so. On his return, they went to have fish and chips at Manly and then talked in the car. The complainant gave evidence that:[1]

> "… when we talking, and he kissed – he tried to kiss me, and he kissed me, but I say I don't want to kiss. And he said, because he broke up with a girlfriend 12 months ago, so he needs a kiss and hug. So he ask me to have a hug, and then he kissed me. But I say I don't want.
>
> And what did he do when you said, 'I don't want'?---He just explain why he want to kiss, because he had just broke up with girlfriend one

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1 AB2 at 31.11-31.19.

> years ago, and he needs kiss and hug. But – and then I say I don't want, but he keep kiss me a few times, but then stopped."

[15] The complainant said they drove around for 20 minutes or so. They agreed to meet up again the next evening. The complainant gave evidence that on the Sunday she instead sent the appellant a message as follows:[2]

> "… I say I don't trust him, because, the first day, he told me he broke up with girlfriend, and he want relationship. He want to marry and have children, and he – when he with his past girlfriend, they together, like, five and six years, is a long relationship. So she – he said that, but after the first day, and I text him, I say I don't really trust him. And because I think the first day I met him, he already kissed me, and I think he is a – like, a player."

[16] The complainant gave evidence of a phone call with the appellant later that same Sunday:[3]

> "He say he – he won't kiss me again. He – he won't have sex with me. The next – tonight, when I met him, he said he can wait and patient, and control himself, because he don't want – if he do that so fast to me, and I will not met him again, he – he don't want that…
>
> …And I – I don't – I said I don't trust him. So, yeah, I – I don't go out, have dinner with him.
>
> … but after dinnertime, about 9 o'clock – because I think I won't meet him that night, I don't meet him, but at 9 o'clock at night time, he – he called me, and say he just finished dinner at his Sunnybank house with brother, and – and he is now going back to Gold Coast. So he called me at night and say if I want to meet him before he drives back to Gold Coast, and then I say okay, I – I go out to meet him.
>
> …When I go into the car, he – we – we didn't discuss where we go, and I didn't ask to. He just drive to a park near Carindale Shopping Centre, because it is through the Carindale Shopping Centre… And then we into the park, and then there is some cars already parked there on the way, so he keep driving into the end of the road. And then – so he parked the car there, and there is no people in cars at this point."

[17] The complainant's evidence in chief as to the events of the evening giving rise to the charges are as follows:[4]

> "…When he parked – stopped the car, and then I'm crying, because I'm not happy at the moment, or before I met him. I'm – I'm not feel happy. I'm sad. So when he stop and park the car, and then I – I cry, because I – I want to start talking with him. And then, when I talk, and then he – he – he kissed – he leaned over to kiss me again. He – yeah. He come to kiss me, and then I say I don't want – because I

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2 AB2 at 31.36-31.42.
3 AB2 at 32.38-33.35.
4 AB2 at 34.28-35.21.

> just want to talk with him, someone to talk, but not doing this. So – but he is still kiss me.
>
> …And when he leaned over and kissed you, his mouth touched your mouth?---Yes.
>
> …I just try to pull him back, because I – I don't want to do that. So I tried to pull him back.
>
> And did you touch his body?---I touched his body, yes. I just hold him not close to me.
>
> And when you were holding his body not close to you, did you say anything? ---Me? Yeah. I say I don't want to kiss.
>
> And what did he say?---He say it's kiss and hug, it's normal to being before a relationship, so he say it's normal thing to do. But I say I – I don't want to do that so quick. So I say I don't want to.
>
> …And then he still kissed me, and then he touched my breast on – over my clothes. On top of my clothes, he touched me. And I keep saying I don't want to do that. And then he – he just say, 'I'm just touching you outside. I'm just touching.' But I still say I don't want that. But he still keep doing. And – and after that, he say, 'I'm just touching outside', but he get my clothes on, and he touched inside my bra and put my bra also up, and he grabbed my breast."

[18] The complainant was asked what she was saying when he lifted her bra up and she replied:[5]

> "When he was doing that, were you saying anything?---I say I – I don't want to do that. I kept saying I don't want, and I keep holding his body or his wrist to try to stop him to touch me and to continue."

[19] The complainant also said "because he is kiss me and then touch me, but I doing this action. I still say I don't want to do that. I say, 'No, I don't want'".[6]

[20] That constituted her evidence as to count 1.

[21] As to count 2, the complainant continued her evidence in chief by saying that after grabbing her breast:[7]

> "… he also sucked my nipples, and then, yeah, both of them, he – he do it.
>
> … And when he sucked your nipples, what were you saying or doing?--- I keep saying I don't want to do that. I said I don't want and don't do that."

[22] As to count 3, the complainant said:[8]

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5 AB2 at 35.28-35.30.
6 AB2 at 36.02-36.03.
7 AB2 at 35.22-35.47.
8 AB2 at 36.05-37.17.

"…After he suck my nipples, and then he tried to touch my pants, to touch my outside my vagina. So, yeah, he – he – he undo the top, and he changed to touch my pants, and can feel touch my vagina.

…And what did you say, if anything?---I say I – because I know he – he is just want doing something, but I just – I just let the – let the seat back.

Did you say anything?---No.

Did you do anything?---No. I just – I didn't do anything.

And the touching your vagina, was that on top of the clothes?---Yes.

And what happened then?---I say – I keep saying I don't want, but he – he say, 'It's okay. I just touching you outside'. So it's – it's like this.

… And as he was touching your vagina, what were you doing and saying?---And I said I don't want to do that. Yeah. I said I don't want. And I'm start crying, because I'm – at the moment, I'm – I – I'm sad, and he also do this.

…So you were crying?---Yeah.

And you said, 'I don't want'?---Mmm.

And what did he do?---He – he say, 'I am just touching you.' And he put his finger inside my vagina, and I can feel he do in and out. And I say I don't want, and he say he is just touching. So he keep do it.

…And when he had his finger in and out of your vagina, how was his body positioned?---He was lean over me. He still sit on the driver's seat, and he lean over me to do that.

…I'm – I'm still lying down on my seat. And he tried to – yeah. He tried to come over me after that, and he remove his pants to the back seat, and he come over on top of me after that."

[23] The complainant recounted the following circumstances as to count 4:[9]

"And what did he do?---He just put his cock out, and he used his cock to touch my vagina. And I just also hold him and ask, 'I don't want', and ask him stop. But he is – he is say, 'I'm just rubbing. I'm just' – just his cock to touch my – my vagina. He is not going inside, he is just touching.

And is he touching his cock on your skin?---Yeah.

And how is he doing that, through the shorts or were the shorts removed?---The shorts still here. He still doing inside my shorts. He put his cock through the pants – the shorts and the underwear, and then touched my vagina. And after that, I say I don't want to do that, he put his cock inside my vagina.

And how long did he have his cock inside your vagina for?---Like, one minute.

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9 AB2 at 37.19-37.46.

> Were you still crying?---Yes. I'm – I'm – I'm crying and say I don't want.
>
> And were you doing anything?---I don't do – I just holding him, try to ask him don't do it. Don't continue to do it.
>
> And then after, what did he do?---He just – he just move, like, up and down, and he tried – want to – tried to put my knees up, put my leg up, but I holding – I just tried to hold my feet on the floor, don't let him hold my leg up. And I still ask him stop, I don't want it.
>
> And did he stop?---When I say that, he still do it, like, around one minute, he still do. But after I – I still crying, and I don't – I just lying down and I didn't move, and I'm crying, so I – and I also asked him stop. So he stopped, and he moved back to his driver's seat, and give me a tissue, because I am crying."

[24] The complainant's evidence as to count 5 continued as follows:[10]

> "…And what happened after he gave you a tissue?---I'm – I am crying, and then we – we talk a while, and I say I'm – I'm not happy, I say, because I have depression, so my life is not happy, and I talk to him. And he say, 'Don't be sad. You – you should not be sad', and we have the conversation. And after that, he touched his pe – he still sit on the – his driver's seat, and then he touch his cock and – and asked me to masturbate – to help him masturbate. And I – I do it for him, because I don't want he will move over and put his cock inside my vagina again, so I help him masturbate. [Count 5] And then I do around one minute. And I say – because I am doing, and then I say, 'You can do it at home', by himself. He go home and do it by himself. And then he say he – he don't want. He want to do it now. And when I'm masturbate him, and he also ask me, can – can he put his cock inside my vagina for a while, but I say no, I don't want.
>
> …And after you touched him or masturbated him, what happened next?---Because there's a while, I help him, and – and he didn't come, so I asked him do it at home, and he say he don't want, but – and then I stop. I didn't help him. And then he get back the pants, and get the pants on. And then I say I want to go home, so he drive me home.
>
> All right. And then he dropped you home or at that bus stop?---Dropped me bus stop, the opposite of the bus stop."

[25] The appellant dropped the complainant back at the same bus stop. It was about 11.00 pm.

[26] The complainant gave evidence of texting with a male friend in the early hours of 26 January 2016. She texted that "[she] had something happen to her" and, in a further text, that a "guy fuck me last night. I don't willing to". When questioned by her friend whether "he raped you", the complainant responded, "I reject him but he keep doing but I didn't go away I [just] want him to stop". She also texted, "I am just silly" and "I trust him I am fault too". Her friend gave her a help line to phone and urged her be medically tested.[11]

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10 AB2 at 38.05-38.40.

11 AB2 at 179-180.

[27] The complainant gave evidence of going to the Royal Brisbane Women's Hospital on 26 January 2016 and speaking to a social worker and telling her:[12]

> "I know a guy on the bus stop, when I am waiting a bus, and then I know him – I met him, and we have dinner on the first day, and he kissed me on the first day that I don't want. But the next day, we supposed to meet again, have dinner, but I say no, I don't go out now, but after dinnertime, he called me to say if I want to see him, and then I say yes. I go out with him. So – so – and then he drive me to a park, and then he want try to have sex with me, kiss me, touch me, and – but I say I – I – I don't want to do that."

[28] The complainant said that the social worker asked her if she wanted to tell the police about what had happened. The complainant responded that she felt it was her "responsibility to go out with him the second day is – is my choice to go out with him. So I think it my bad luck".[13] She said the social worker, and two people she spoke to on the hotline, told her that "if I say no, and it happens, I say no, and it is not – it is wrong. It is not correct".[14] The complainant then decided to talk to the police about what had happened.

The complainant's cross examination evidence

[29] The complainant was cross examined about her first date with the appellant and agreed they had both discussed wanting a serious relationship and that they got on well. She agreed she texted with the appellant the following day (Sunday) concerning wanting a serious relationship. She said that she just wanted to go out to talk and not to kiss again.[15]

[30] The complainant was cross examined about meeting up with the appellant on the Sunday evening. She agreed to the proposition that, after they reached the carpark and she started crying, the appellant may have put an arm around her and that it was possible that she kissed him.[16] The complainant said that there was kissing for maybe five minutes.[17] The complainant accepted that she was kissing him back.[18] The complainant was cross examined as to whether it was "at this point, [the appellant] might have kissed [her] around the breast area …and nipples" to which she responded "yes".[19] The complainant also accepted that, although in her evidence in chief she said that when the appellant started to kiss her, she was holding the appellant and trying "to pull him back", in her police statement she did not say anything about holding the appellant's shoulders or trying to push him until *after* the rubbing of the breast.[20]

[31] The complainant's cross examination evidence as to the penile rape count was as follows:[21]

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12 AB2 at 40-41.
13 AB2 at 41.01-41.02.
14 AB2 at 41.16-41.17.
15 AB2 at 53.
16 AB2 at 56.35.
17 AB2 at 57.10.
18 AB2 at 61.11.
19 AB2 at 61.15-20.
20 AB2 at 60.25-32.
21 AB2 at 63.

> "But what actually happened, I suggest, is that you voluntarily or you moved your knees apart and your legs apart while he was there?---No.
>
> That you did that yourself?---No, I don't agree.
>
> And he didn't actually force your legs apart at all to put his penis in your vagina?---Yeah, he forced to do it.
>
> But I suggest, though, that if he was in front of you in the car and he's forcing that to happen, you could have just simply held your legs together?---Yes.
>
> But you didn't do that?---I keep – when this happen, from he – from he touch my breast, I keep holding his body and the [indistinct] to stop he – to stop he close to me and touch me, but he just do it, continue to do it, touching outside, touching inside my breast.
>
> I'm just – sorry, I'm just talking about the penis into the vagina part, so just that part?---Yeah. I – I'm – I did say I don't want it, I don't want to do that. I ask him to stop, and I holding he. I try to holding – holding him not to do that.
>
> But what I'm just saying to you purely about your legs is that you're sitting or you're in a seat in the front seat of the car, and you could have just kept your legs together?---Yes.
>
> But I'm suggesting that you opened your knees and you opened your legs?---No. He did it.
>
> That he - - -?---He did – he tried to put his cock inside me. I didn't open my leg for him. I don't do that."

[32] The complainant rejected the proposition that she was not crying at that time[22] and denied that she responded physically to the appellant's acts:[23]

> "And the second part of what I'm suggesting is the only time you touched his penis was before it went into your vagina?---No, it's after.
>
> Now, he – when there was the intercourse, the actual penis in your vagina, you, I suggest, moved your hips around. Do you agree or disagree with that?---My hips- - -
>
> Yes?---Move around?
>
> Yes?---No, I don't agree.
>
> And can I suggest to you that if it's in a very small space – and we're inside a car, we're in a seat – that it would be very difficult to not move your hips around while his penis is in your vagina?---Because during this time, I'm crying and I'm holding – I keep holding his body. And I keep saying I don't want to do that. So I'm not moving around. I just use my hand to hold his body, try to – try to let him – don't do – don't do it more."

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22 AB2 at 67.25-67.40.

23 AB2 at 66.39-67.08.

[33] When further pressed in cross examination as to whether she in fact used the word "stop", she accepted that she might not have used that word but was adamant that she said, "I don't want".[24]

The pretext call

[34] Evidence was given of a pretext call between the complainant and the appellant on 29 January 2016, during which a further meeting was mentioned:[25]

> "Complainant: Because I don't … want so fast but, but ah you say you can wait, you can patient for me but …
>
> Appellant: I will be now 'cause I know I touched you, okay. Alright. So don't panic. Okay.
>
> Complainant: But last Sunday night you say you won't have sex with me but you say you won't and then, but, but you did.
>
> Appellant: Hey, because I want to, because I was going away for the week, okay. If I'd seen you during the week I would have waited, but because I was going away for the week, that was to make sure you don't forget about me. Okay. Come on, come on. If that's what you're worried about, don't worry, don't worry, we won't do anything okay.
>
> Complainant: Because I'm … sad.
>
> Appellant: I don't want you sad, okay. Don't need to be sad. Should be happy, 'cause you have a relationship…
>
> Complainant: Just I contact you because, because now Sunday night you didn't text me anything and then no phone, no call, no text message.
>
> Appellant: Because I told you I had to get back to the Gold Coast, I had to leave early the next morning, okay. So I was concentrating on what I needed to do the next with work. …Anyway, come on, you just think about it. Send me a message, or I'll send you a message later and ask you what's suitable for you, Saturday or Sunday. If you can't go anywhere today, Saturday or Sunday. Okay."

The appellant's evidence

[35] The appellant, who was aged 57 at the time of the offending, gave evidence that he offered the complainant a lift to the shopping centre because not many buses came through there.[26] The appellant said he asked the complainant if he could get a photo

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24 AB2 at 73.45.
25 AB2 at 194-195.
26 AB2 at 123.

with her so he "could just put it against the contact number".[27] He said he told her that, "Maybe we can catch up tonight".[28] He said that later that afternoon, the complainant texted the appellant to find out if they were still going to go out.

[36] The appellant said they went to Mt Gravatt and that the date lasted for something like two and a half hours. They spoke about relationships. The appellant asked the complainant if she was single and told her that he was single but that he had ended a relationship with his last girlfriend about 12 months earlier and had not been in a serious relationship since. The appellant thought they got along well and "things felt comfortable".[29] They held hands, sat next to each other and ate dinner together. After dinner, the appellant said they spoke about each wanting a serious relationship. The complainant told him that she wanted a serious relationship with a person who would want to take care of her. The appellant said that he hugged and kissed the complainant.

[37] The appellant gave evidence of subsequently receiving a text message:[30]

> "…Originally she said to me she didn't trust me. She sent me a text message say that she didn't trust me and that she was worried about me kissing and cuddling her, and I said to her 'There's nothing to worry about'. I said 'We – there's no pressure on you from me at all', and she also mentioned about having sex. She goes 'If you want that, then you'll want sex'. I said 'There's no hurry'. I said 'I can wait'. I told her that very clearly, I can wait for the right moment."

[38] The appellant gave evidence of meeting up again with the complainant:[31]

> "When you picked her up, was there any plan to go anywhere in particular?---I asked her if she wanted to go anywhere, and she didn't mind. She said 'Just as long as we go somewhere to talk'. So that's basically what we did. We drove down to the park …
>
> … she's given some evidence that she was crying and that she was sad. If I can take you to that point – do you remember that happening?---Yes. Yes. She was upset. She was upset about one of her friends or something and - - -
>
> And what did you do?---I just put my arms around, said 'Hey, things'll be okay. You know – don't worry so much. You know – you want to talk about it?' just things like that. I just spoke to her, just try and calm her down.
>
> And what did she do? How did she react to that?---When I put my arms around her she leant back into me. So – let me console her or comfort her, and that lasted, probably – lasted for five or 10 minutes, just hugging, just consoling her. That was it at the time.
>
> …And then after she stopped crying – then what happened?---We were still hugging, and I gave her a little kiss on the cheek, and she seemed okay. I mean – she was – seemed to be happy with that. And then I kissed her on the neck a few more times, down the neck,

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27 AB2 at 124.
28 AB2 at 124.
29 AB2 at 125.
30 AB2 at 126.21-126.27.
31 AB2 at 126.44-127.43.

> and she was responsive. Like – she looked at me and smiled about it…
>
> Why did you kiss her on the cheek?---Just to maybe try and make her feel better because she was – she had issues and just trying to comfort her."

[39] The appellant said that they were hugging probably for about 10 minutes and then kissed.

[40] As to count 1, the appellant said he started to massage the complainant's breasts on the outside of her clothes and that she "was a little bit more responsive or more active" and then he put his hands inside her clothes and touched her breast. The appellant denied that that occurred without the complainant's consent. The appellant said:[32]

> "… [the complainant] was giving me back basically what I was doing to her. She was touching me. She was – she was in – seemed to be in the mood to do things… She was holding me. She had her arms around me. She was holding me."

[41] As to count 2, the appellant said that after he put his hand inside her clothes and was touching her breasts, he said he kissed her across the top of the breast and put his mouth on her breast, because he "believed it was just a romantic thing to do". He denied that this was done without consent, stating that the complainant "knew what we were doing and she was participating quite willingly".[33]

[42] As to count 3, the appellant did not dispute that he digitally penetrated the complainant. He maintained that the complainant was holding him and kissing and cuddling him.[34]

[43] As to count 4, the appellant agreed that he penetrated the complainant's vagina with his penis. He said he did that when he "realised that she was into – in a mood that was encouraging [him] to continue".[35] He maintained that the complainant did not "at any stage … say, 'Stop. I don't want it. Not now" but that she was responding and "giving as much as – you know, I mean, I was taking it easy, and she was – she was really going for it".[36] The appellant said that the intercourse ended after about 10 minutes because the appellant was tired and it was not the plan to have sex. Also he did not have a condom.

[44] As to count 5, the appellant disputed that he asked the complainant to masturbate him or that she did so.

[45] The appellant gave evidence of a police interview on 5 February 2018 (about five days after the pretext telephone call). He explained his denial in the interview of having had sex with the complainant on the basis that he had never been in trouble with the police, and he had panicked and made a mistake.

Redirections

[46] The jury sought directions as to, "Does I don't want, equal no by law" and the definition of consent by law.

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32 AB2 at 129.28-129.33.
33 AB2 at 130.
34 AB2 at 131.25-131.29.
35 AB2 at 131.47-132.01.
36 AB2 at 132.

[47] Her Honour redirected the jury as follows:[37]

> "…But I will remind you of the direction in law I gave you in respect of consent and mistake of fact… So I will tell you a couple of things about consent. I said, it has to be at the time of penetration, or the touching. Not before or after. That is the time, when it's an issue. It means consent freely and voluntarily given by a person with the cognitive capacity to give consent, the where with all to give consent. It does not have to be enthusiastic consent. It can be passive acquiescence. But there must be a consent. And I think I used the term yesterday, 'regretted sex' is not non-consensual.
>
> …In relation to the other question … what I said to you was, a person who does an act under a mistaken, an honest and reasonable but mistaken belief in the state of things, is no more responsible than if that state of things had existed. So here, the question is; if the [appellant] acted in touching [the complainant] in the various ways described, under an honest and reasonable, but mistaken belief that she was consenting, then he's no more criminally responsible than if she was. So he is not guilty. I said, if you conclude that the real state of things was, that she was not consenting, but he honestly and reasonably believed she was, he should be found 'not guilty.' A mere mistake is not enough.
>
> The mistaken belief must have both been honest and reasonable, in the circumstances, in all the circumstances in the car that night. An honest belief is one genuinely held by the [appellant], and to be reasonable it must be a belief held by him in his particular circumstances, on reasonable grounds. The big thing is, there is no burden on him to prove that he was acting under an honest and reasonable mistake. It is for the prosecution to negative it. To prove he was not. And they must prove that beyond reasonable doubt in order to find him guilty. They can do it in two ways. They can either prove that it was not a genuine and honest mistake in the circumstances. Or they can prove that it was not reasonable in his particular circumstances, to come to that view. And if they prove either of those things beyond reasonable doubt, then mistake is off the table.
>
> But it is not for him to prove he was. It is for the prosecution to prove he was not. That is because the prosecution must not only prove the charge, it must negative – disprove possible defences like this. The question, does I don't want, equal no by law? Not necessarily. It depends on the circumstances. That is a factual matter for you. So I cannot answer that. I cannot tell you that certain words equal lack of consent, because it all depends on the circumstances."

Principles as to inconsistent verdicts

[48] The question for determination, bearing in mind the test in *M v The Queen*,[38] is whether, given the jury's verdict of not guilty on counts 1, 2 and 5, it was open to the jury, on

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37 AB2 at 86.18-87.10.

38 (1994) 181 CLR 487 at 493-494.

the whole of the evidence, to be satisfied beyond reasonable doubt of the guilt of the appellant on the count on which he was convicted.[39]

[49] The principles concerning inconsistent verdicts were summarised in *R v GAW*,[40] by reference to *MacKenzie v The Queen*[41] as follows:

> "The principles concerning inconsistent verdicts are well-established.[42] Where alleged inconsistency arises in the jury verdicts upon different counts affecting an accused, **the test is one of 'logic and reasonableness'**; that is, whether the party alleging inconsistency has satisfied the court that **the verdicts cannot stand together because 'no reasonable jury, who had applied their mind properly to the facts in the case could have arrived' at them**.[43]
>
> However, respect for the jury's function results in a reluctance in appellate courts accepting a submission that verdicts are inconsistent in the relevant sense, so that:[44]
>
> > '... if there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required, that conclusion will generally be accepted. **If there is some evidence to support the verdict said to be inconsistent, it is not the role of the appellate court, upon this ground, to substitute its opinion of the facts for one which was open to the jury**.'
>
> In that regard, 'the view may be taken that the jury simply followed the judge's instruction to consider separately the case presented by the prosecution in respect of each count and to apply to each count the requirement that all of the ingredients must be proved beyond reasonable doubt'.[45] Alternatively, the appellate court may conclude that the jury took a merciful view of the facts on one count; a function which has always been open to a jury.[46]
>
> **It is only where the inconsistency rises to the point that the appellate court considers intervention is necessary to prevent possible injustice that the relevant conviction will be set aside**.[47] While it is impossible to state hard and fast rules, the following provide examples of relevant inconsistency;[48] **where the different verdicts returned by the jury are an affront to logic and common sense which is unacceptable**, and strongly suggests a compromise in

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39 See *Jones v The Queen* (1997) 191 CLR 439 at 450-452 and 455 (per Gaudron, McHugh and Gummow JJ).

40 [2015] QCA 166 at [19]-[23]; applied in *R v Latsamyvong* [2017] QCA 174 at [152]; *R v McLucas* [2017] QCA 262 at [65]; *R v MCQ* [2018] QCA 160 at [82]; *R v MCT* [2018] QCA 189 at [107].

41 (1996) 190 CLR 348.

42 See *MacKenzie v The Queen* (1996) 190 CLR 348 at 366-368 (per Gaudron, Gummow and Kirby JJ).

43 *MacKenzie v The Queen* (1996) 190 CLR 348 at 366 (per Gaudron, Gummow and Kirby JJ) quoting *R v Stone* (unreported, 13 December 1954) per Devlin J.

44 *MacKenzie v The Queen* (1996) 190 CLR 348 at 367 (per Gaudron, Gummow and Kirby JJ) (citations omitted).

45 *MacKenzie v The Queen* (1996) 190 CLR 348 at 367 (per Gaudron, Gummow and Kirby JJ) (citations omitted).

46 *MacKenzie v The Queen* (1996) 190 CLR 348 at 367 per Gaudron, Gummow and Kirby JJ.

47 *MacKenzie v The Queen* (1996) 190 CLR 348 at 368 per Gaudron, Gummow and Kirby JJ.

48 *MacKenzie v The Queen* (1996) 190 CLR 348 at 368 per Gaudron, Gummow and Kirby JJ.

> the performance of the jury's duty, or which suggests confusion in the minds of the jury, or a misunderstanding of their function, or uncertainty about the legal difference between specific offences, or a lack of clarity in the instruction on the applicable law.
>
> In *R v CX*,[49] Jerrard JA, referring to *Osland v The Queen*,[50] stated:
>
> > '**Verdicts of guilty and of acquittal will show the required inconsistency where a verdict of acquittal necessarily demonstrates that the jury did not accept evidence which they had to accept before they could bring in the verdict or verdicts of guilty** which they did; or when it follows that when acquitting on a particular count, the jury must have accepted evidence that required them to acquit on a count or counts on which they convicted the defendant.'" (my emphasis)

The appellant's submissions

[50] The essence of the appellant's argument on ground 1 was that if the jury was not satisfied of the complainant's evidence that she communicated her lack of consent in relation to the acts that occurred both before the penile penetration (counts 1 and 2) and after (count 5), then that involved a very significant rejection of her evidence. It was contended that since there was no difference in the *quality* of the supporting evidence as between the rape charge and the sexual assault charges, it was not rational that the jury were then able to convict of the rape charge, where that conviction also relied upon on the complainant's credibility and reliability on the same issues.

[51] It was argued that if the counts were to be reconciled at all, it could only be on the basis of a mistake of fact. It was argued, however, that a doubt about the complainant's emphatic statements that the charged acts were done against her expressed vocal resistance, would be incompatible with the acceptance of the complainant's evidence beyond reasonable doubt in relation to count 4.

[52] It was argued that there was no room for mistake of fact to arise given that it was submitted that, on the complainant's account of events, she was at all times "emphatic" as to not giving her consent.

Consideration

[53] The jury's verdicts indicate that the jury approached their task by considering the counts separately as they were directed to do. In so doing, the jury distinguished between guilt on the lesser counts 1 and 2 and the much more serious count 4. The verdicts of not guilty on counts 1 and 2 are capable of giving rise to two inferences; that the jury were left with a reasonable doubt that the complainant did not consent to the appellant's touching and sucking of the complainant's breast, or that, even if they had no doubt that consent was not given, that they were not satisfied beyond reasonable doubt that the defence of that honest and reasonable but mistaken belief as to consent was excluded. The jury's failure to agree on count 3 is neutral. However, the jury's verdict on count 4 meant that they were left with no relevant doubt both that the complainant did not consent to penile penetration and that honest and reasonable but mistaken belief of consent to that act had been excluded.

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49 [2006] QCA 409 at [33].

50 (1998) 197 CLR 316 at 356-357 per McHugh J.

[54] On either view of the possible reasoning of the jury in respect of their acquittals on counts 1 and 2, I do not consider that those verdicts are inconsistent as a matter of logic and reasonableness with the verdict of guilty on count 4.

[55] I do not consider that the holding of a reasonable doubt as to whether the complainant gave consent in respect of counts 1 and 2 would have necessitated the rejection of the complainant's evidence of not consenting to the rape charge in count 4. Nor do I consider that a reasonable doubt as to the exclusion of the defence of mistaken belief on counts 1 and 2 necessitated a reasonable doubt as to the exclusion of mistake on count 4. In my view, the verdicts were able to be reconciled in a logical and reasonable manner.

[56] As to the element of lack of consent, it was open to the jury to consider that there was a difference in the quality of the complainant's evidence of lack of consent as between counts 1 and 2 and count 4. The appellant's contention that those verdicts were inconsistent was premised on the submission that the complainant gave the same "emphatic" evidence of not consenting in respect of all counts. But that submission was based on her evidence in chief that she repeatedly said she "did not want" in respect of the acts charged in counts 1 and 2.[51] The appellant's contention that the complainant unambiguously indicated to the appellant that she was not consenting was made without reference to the complainant's concessions in her cross examination evidence as to the lesser charges. Notwithstanding her evidence of expressly saying no and that she did not want the appellant's advances, the complainant accepted in cross examination that she responded to the appellant kissing her by kissing him back. She also accepted that it was at that point, that the complainant might have kissed the complainant's breasts and nipples. The complainant further accepted that, unlike her evidence at trial, she told police that it was after the appellant rubbed her breast that she tried to push him. When regard is had to those concessions, the jury may have considered that there was an ambiguity or equivocation as to the issue of consent.

[57] Contrary to the appellant's contention before this Court, it is possible that the jury took the view, on a consideration of the whole of the complainant's account of events, that the complainant was not "emphatic" that she was not consenting to the acts constituting counts 1 and 2, such that there was a reasonable doubt as to the complainant's lack of consent to those acts. Furthermore, when taking into account the cross examination evidence, the jury may well have also concluded that they could not exclude the defence of honest and reasonable but mistaken belief as to the complainant's consent to the acts constituting counts 1 and 2. Accordingly, the jury's verdict may be understood as giving the appellant the benefit of the doubt. That is, the jury's acquittals indicate that they were unable to be satisfied of guilt to the requisite standard, rather than signifying a rejection of the complainant's evidence.

[58] Such conclusions did not render the jury's acceptance of the complainant's evidence that she did not consent to penile intercourse illogical or irrational. Any perception of ambiguity as to consent to the acts of touching and sucking the complainant's breasts was able to be put aside in relation to the very different act of penile intercourse, in respect of which no concession was made in cross examination of responding in any way or participating willingly. It was entirely open to the jury,

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51 AB2 at 35.

therefore, to conclude that, notwithstanding that they had a reasonable doubt on the issue of consent as to counts 1 and 2, there was no doubt as to the complainant's lack of consent on the charge of rape, the subject of count 4, nor any room for doubt that a s 24 defence had been excluded beyond reasonable doubt.

[59] As to count 4, the evidence of the complainant (who clearly had poor English and required some questions to be repeated), both in chief and in cross examination, was consistently to the effect that she told the appellant that she did not want him to do what he was doing. On her evidence she said no and started to cry and pushed him when he inserted his finger into her vagina and penetrated her vagina with his penis. The complainant did not waiver from her account that she did not respond to the appellant's penile penetration physically in any manner capable as signifying she consented. Indeed, it was open to the jury to accept her consistent evidence that she commenced crying and continued to do so during the act of penile penetration as signifying her lack of consent.

[60] In addition, the jury were able to consider the pretext call as providing some support for the view that the complainant did not consent to penile intercourse and that the appellant was aware of that and did not have an honest belief to the contrary at the relevant time. The jury were also able to have regard to the pretext call evidence and its inconsistency with the appellant's evidence at trial that the complainant was a willing and enthusiastic participant in the penile intercourse. The jury were also entitled to consider that the appellant's constant recounting, when giving evidence, of what he "would have done", notwithstanding repeated warnings by the trial judge not to do so, as being indicative of his reconstructing what occurred and as reflecting adversely on his credibility.

[61] The jury were thus entitled to see counts 1 and 2 in a different light from count 4, given the complainant's cross examination evidence on those counts. As I have already stated, the concessions made by the complainant were capable of leaving the jury with a doubt as to lack of consent or as to whether s 24 of the Code had been excluded on counts 1 and 2. The differing verdicts as between counts 1 and 2 on the one hand and count 4 were not only able to be understood as rational but also demonstrated that the jury conscientiously considered the counts separately as they were directed to do. The acquittals on counts 1 and 2 did not require the jury, acting logically and reasonably, to also have a reasonable doubt as to guilt of count 4.

[62] It was open to jury to believe the complainant's evidence that she did not consent to count 4 while having a reasonable doubt about consent to count 1 and 2. It was also open to them to take the view that, while a s 24 defence could not be excluded on the evidence of the complainant as whole including her concessions on those counts, it could be excluded given her different evidence as to count 4. It was open to them to consider that her evidence of saying no and that she did not want what the appellant was doing as a more emphatic communication of not consenting, when combined with her evidence of pushing the appellant and of crying.

[63] The issue which the jury were required to consider and which the trial judge referred to as date rape is a complex and difficult one. The Crown case was that the appellant took advantage of the complainant's desire for a genuine long term relationship to sexually assault her. It is a serious step for an appellate court to overturn the verdict of guilty of a jury who has had the opportunity to see and assess the witnesses on the ground that a guilty verdict was so inconsistent with other verdicts as to amount to an affront to logic and reasonableness.

[64] In my view, the verdicts do not reflect confusion by the jury but a careful consideration of the issue of consent and honest and reasonable but mistaken belief. Given that the Court strains to avoid a conclusion of inconsistent verdicts, recognising the primacy to be given to the role of the jury, and that there is a logical and reasonable way of reconciling the verdicts, I consider that intervention by this Court to overturn the verdict of guilty to rape cannot be justified.

Ground 2

[65] The trial judge gave an *Edwards*[52] direction concerning those lies arising from the appellant's police interview in terms of their use as showing a consciousness of guilt. It was not contended that an *Edwards* direction should not have been given in that regard. Nor was there any misdirection alleged concerning that direction. I do not consider that the lies as to the appellant's personal life also required an *Edwards* direction.

[66] The complaint made by ground 2 is that the trial judge erred in not also giving a direction along the lines of a *Zoneff*[53] direction as to a distinct category of lies about the appellant's personal life (such as being single and having separated from his girlfriend, living at Sunnybank and being an engineer). The direction that it was contended ought also to have been given was a warning not to reason that the deliberate lies told by the appellant as to his personal life, which affected his credibility, were not able to be used as evidence of guilt.

[67] The *Zoneff* direction often includes an explanation that lies may be told for innocuous reasons, including because of panic. The primary judge's opinion that giving both *Zoneff* and *Edwards* directions might be confusing may be understood in the context that, in this case, panic was the explanation offered by the appellant for the lies he told police in his interview and which were ruled on as capable of going to a consciousness of guilt. The authoritative *Edwards* direction was required for the latter lies.

[68] In *R v Dhanhoa*,[54] the High Court, in rejecting the proposition that a *Zoneff* direction ought to have been given in that case said:

> "It is not necessary for a trial judge to give a direction, either of the kind referred to in Edwards, or of the kind referred to in *Zoneff*, every time it is suggested, in cross-examination or argument, that something that an accused person has said, either in court or out of court, is untrue or otherwise reflects adversely on his or her reliability. Where the prosecution does not contend that a lie is evidence of guilt, then, unless the judge apprehends that there is a real danger that the jury may apply such a process of reasoning, as a general rule it is unnecessary and inappropriate to give an *Edwards* direction. *Zoneff* was said to be an unusual case, and the direction there proposed was said to be appropriate where there is a risk of misunderstanding about the significance of possible lies. The present was not such a case." (footnotes omitted)

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52 *Edwards v The Queen* (1993) 178 CLR 193.
53 *Zoneff v The Queen* (2000) 200 CLR 234.
54 (2003) 217 CLR 1 at [34].

[69] It is difficult to see how the jury could have failed to distinguish between the more serious lies told to police (about which a warning was given) and those concerning the appellant's personal life used to ingratiate himself with the complainant. Even if it may have been better to have given the *Zoneff* direction, as McHugh and Gummow JJ emphasised in *Dhanhoa*,[55] citing *Simic v The Queen*,[56] to succeed on appeal the appellant must establish more than that there was a "possibility" that the jury may have impermissibly reasoned to guilt. It must be shown that it is a "reasonable possibility" that the failure to direct the jury "may have affected the verdict".

[70] In my view, no miscarriage of justice resulted from the failure to give a *Zoneff* direction in relation to the lies about the appellant's personal life. I do not consider in the circumstances of this case (where an *Edwards* direction was given as to the lies told to the police) that there was a reasonable possibility that a failure to warn against impermissible reasoning to guilt in respect of the lies as to the appellant's personal circumstances may have affected the verdict.

Ground 3

[71] As to ground 3, which concerns the reading of the complainant's evidence without directions on warnings as to its use and without rehearing the evidence of the appellant or a reminder of it, that ground also fails in my view.

[72] The relevant principles have been recently considered in *R v Halliday*,[57] where the following summary, set out in *R v LAK*,[58] was adopted:[59]

> "The authorities establish that where all or part of the complainant's evidence is replayed to the jury after they have retired, it is desirable that the jury be warned not to give undue weight to that evidence and, where applicable, to remind the jury of evidence called by the defendant. The giving of such a direction is not, however, an immutable standard. As was emphasised in *Gately*, whether such a direction is necessary depends on the circumstances of the particular case. The overriding consideration is whether fairness and balance gives rise to the need to guard against the risk that undue weight might be given to a complainant's evidence where it is played a second time without a warning, or where no reminder is given to the jury about the competing evidence or considerations relied on by the defence.
>
> Ensuring fairness and balance may give rise to particular difficulties in emotive sexual cases which are particularly likely to arouse feelings of prejudice in the jury. Factors that will be relevant include those identified in *SCG*, namely, the time that has elapsed after completion of the defence evidence; the time that has elapsed since the conclusion of the summing up; the character of the complainant's evidence, including the manner in which it is given; the course of the trial, in particular the stage of deliberations that the jury has reached; and the length of time that the relevant evidence occupies." (footnotes omitted)

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55 (2003) 217 CLR 1 at [38].
56 (1980) 144 CLR 319 at 332.
57 [2018] QCA 279.
58 [2018] QCA 30.
59 [2018] QCA 279 at [42] and [58].

[73] The specific request to rehear the evidence of the complainant, in circumstances where the trial was of short duration and not long before their request the jury had heard the appellant give evidence, did not call for a direction as contended for by the appellant. It is to be recalled that the complainant's English was poor and the desire to rehear it can be understood as merely reflecting that the jury was conscientiously approaching their task of considering the evidence.

[74] **McMURDO JA:** I agree with Henry J that the appeal against conviction should be allowed, the conviction quashed and a verdict of an acquittal entered. In my view the jury's verdict on count 4 cannot be reconciled with the acquittals on counts 1 and 2.

[75] I do see a basis upon which the verdicts on counts 4 and 5 could be reconciled. The jury may have acquitted on count 5 because they were left in doubt about whether, according to the complainant's own evidence, she consented to the conduct the subject of that charge. The relevant passage from her evidence is set out by Henry J at [90]. On that evidence, she expressed no objection to the conduct and the jury may have been influenced by the trial judge's direction that consent could be given by a "passive acquiescence". The jury was not instructed, by particular reference to her evidence on count 5, that her passive acquiescence may not have been a consent "freely and voluntarily given": s 348(1) of the *Criminal Code*. The acquittal on count 5 was not necessarily inconsistent with an acceptance of the complainant's credibility and reliability as a witness.

[76] However the verdicts on counts 1 and 2 are in a different category. True it is that these offences were less serious than that which was the subject of count 4. Nevertheless, the complainant's evidence was that she unambiguously protested the acts the subject of counts 1 and 2 from the outset, and a doubt about her evidence in that respect cannot be reconciled with the jury being in no doubt as to substantially equivalent evidence on count 4. As I read the cross examination of the complainant, there was no concession or other evidence by her which was inconsistent with her evidence in chief. And in re-examination, she continued to say that she was trying to stop him at any relevant time. The jury could not have acquitted on counts 1 and 2 without being in doubt about her credibility, and there was nothing to dispel that doubt in the evidence about count 4.

[77] **HENRY J:** The appellant was convicted by a jury of rape and sentenced to four and a half years' imprisonment suspended after 14 months. He appeals his conviction. The Attorney-General appeals his sentence.

[78] The trial involved two notorious sources of potential trouble for prosecution cases: complicating one criminal episode with an unnecessary number of charges and reliance on lies. As to the former, in respect of the five counts the prosecution chose to indict for one episode of allegedly non-consensual activity in a parked car, the jury returned one guilty verdict, three not guilty verdicts and failed to agree on one count. As to the latter, the prosecution's reliance on the appellant's lies to the complainant about his eligibility as an attractive dating proposition risked being misused as going beyond credit to guilt but no direction was given to the jury as to the use to which the jury could put those lies.

[79] For the reasons which follow, the appeal against conviction must succeed. It will therefore be unnecessary to decide the Attorney-General's sentence appeal.

Background

[80] The appellant, a middle-aged male, saw the complainant, a woman in her late twenties, outside a bus stop and offered her a lift. She accepted, they exchanged phone numbers and met up for a date that evening. On that date they held hands, hugged and kissed. The complainant, a Chinese national, told the appellant she was looking for a serious relationship in which someone would take care of her. They met again two days later in the evening when the appellant collected the complainant at a bus stop. He drove them to a suburban park where the episode attracting the conviction occurred in the appellant's car.

[81] At first, they sat talking in the car. Then the appellant kissed the complainant. On her account, she told him she did not want to kiss. He then touched her breasts on the outside of her clothing, in response to which, on her account, she repeatedly said, "I don't want that". The complainant testified that during the ensuing charged conduct by the appellant she repeatedly and unambiguously told him she was not consenting.

Count 1 Sexual Assault (Breast touching)

[82] The appellant reached inside the complainant's shirt and bra and grabbed her breasts. The following testimony was given by the complainant in evidence-in-chief on the topic of whether she was consenting to her breasts being touched in that way:

> "When he lift – so he lifted your top up; is that right?--- Mmm.
>
> Then he lifted your bra up?--- Yes.
>
> When he was doing that, were you saying anything?--- I say I – I don't want to do that. I kept saying I don't want, and I keep holding his body or his wrist to try to stop him to touch me and to continue.
>
> And what did he say, if anything, to you, when you were saying, "I don't want to do that"?--- He say it is okay, he is just touching me. It is okay. And I say I don't want, but he keep do it."[60] (emphasis added)

[83] This touching of her breasts attracted count 1 on the indictment, a charge of sexual assault, in respect of which the jury found the appellant not guilty.

Count 2 Sexual Assault (Breast sucking)

[84] The appellant then sucked the nipples of the complainant's breasts. The following testimony occurred in evidence-in-chief on the issue of whether or not that conduct was consensual:

> "And when he sucked your nipples, what were you saying or doing?--- I keep saying I don't want to do that. I said I don't want and don't do that.
>
> And when he was touching your breasts before, what were you saying and doing?--- Before he touched me? I – because he is kiss me and then touched me, but I doing this action. I still say I don't want to do that. I say, "No, I don't want.""[61] (emphasis added)

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60 AR 35 LL24-34.

61 AR 35 L46 – 36 L4.

[85] The kissing of her breasts attracted count 2 on the indictment, another charge of sexual assault, in respect of which the jury found the appellant not guilty.

Count 3 Rape (Digital)

[86] After lowering the complainant's car seat, the appellant touched the complainant's vagina outside her clothing and then reached under it and inserted his finger into her vagina. As to whether that occurred with the complainant's consent, the following exchanges occurred in the course of evidence-in-chief:

> "And the touching your vagina, was that on top of the clothes?---Yes.
>
> And what happened then?--- I say – I keep saying I don't want, but he – he say, "It's okay. I just touching you outside". …
>
> And as he was touching your vagina, what were you doing and saying?--- And I said I don't want to do that. Yeah. I said I don't want. And I'm start crying, because I'm – at the moment, I'm – I – I'm sad, and he also do this. …
>
> And you said, "I don't want"?--- Mmm.
>
> And what did he do?--- He – he say, "I am just touching you." And he put his finger inside my vagina, and I can feel he do it in and out. And I say I don't want, and he say he is just touching. So he keep do it."[62] (emphasis added)

[87] That act attracted count 3 on the indictment, a charge of rape upon which the jury could not agree.

Count 4 Rape (Penile)

[88] The appellant then removed his pants and manoeuvred himself above the complainant and inserted his penis past her pants and inside her vagina for about a minute. The following exchanges in the course of evidence-in-chief again made plain that, as with the preceding conduct, the complainant was not consenting and communicated that absence of consent:

> "And what did he do?--- He just put his cock out, and he used his cock to touch my vagina. I just also hold him and ask, "I don't want", and ask him to stop. But he is – he is say, "I'm just rubbing. I'm just" – just his cock to touch my – my vagina. He is not going inside, he is just touching.
>
> And is he touching his cock on your skin?--- Yeah.
>
> And how is he doing that, through the shorts or were the shorts removed?--- The shorts still here. He still doing inside my shorts. He put his cock through the pants – the shorts and the underwear, and then touched my vagina. And after that, I say I don't want to do that, he put his cock inside my vagina.
>
> And how long did he have his cock inside your vagina for?--- Like, one minute.
>
> Were you still crying?--- Yes. I'm – I'm – I'm crying and say I don't want.

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62 AR 36 L27 – 37 L8.

> And were you doing anything?--- I don't do – I just holding him, try to ask him don't do it. Don't continue to do it.
>
> And then after, what did he do?--- He just – he just move, like, up and down, and he tried – want to – tried to put my knees up, put my leg up, but I holding – I just tried to hold my feet on the floor, don't let him hold my leg up. And I still ask him stop, I don't want it.
>
> And did he stop?--- When I say that, he still do it, like, around one minute, he still do. But after I – I still crying, and I don't – I just lying down and I didn't move, and I'm crying, so I – I also asked him stop. So he stopped, and he moved back to his driver's seat, and give me a tissue, because I am crying."[63] (emphasis added)

[89] That conduct attracted count 4, a further charge of rape, the only count of which the appellant was convicted.

Count 5 Sexual Assault (Masturbation)

[90] On the complainant's account, after she continued to ask the appellant to stop, he did so and moved to the driver's seat, giving her a tissue because she was crying. She testified he then touched his penis and asked her to masturbate it for him. On her account, she did so because she did not want him to put his penis inside her vagina again. The testimony in evidence-in-chief on this topic included the following:

> "Okay. And what happened after he gave you a tissue?--- I'm – I am crying, and then we – we talk awhile, and I say I'm – I'm not happy, I say, because I have depression, so my life is not happy, and I talk to him. And he say, "Don't be sad. You – you should not be sad", and we have the conversation. And after that, he touched his pe – he still sit on the – his driver's seat, and then he touch his cock and – and asked me to masturbate – to help him masturbate. And I – I do it for him, because I don't want he will move over and put his cock inside my vagina again, so I help him masturbate. And then I do around one minute. And I say – because I am doing, and then I say, "You can do it at home", by himself. He go home and do it by himself. And then he say he – he don't want. He want to do it now. And when I'm masturbate him, and he also ask me, can – can he put his cock inside my vagina for a while, but I say no, I don't want. …
>
> Okay. All right. And so where were his pants when he – when you were masturbating him?--- The pants is on the back seat.
>
> Okay. And after you touched him or masturbated him what happened next?--- Because there's a while, I help him, and – and he didn't come, so I asked him do it at home, and he say he don't want, but – and then I stop. I didn't help him. And then he get back the pants, and get the pants on. And then I say I want to go home, so he drive me home."[64] (emphasis added)

[91] This attracted count 5 on the indictment, a further charge of sexual assault, of which the appellant was also acquitted.

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63 AR 37 LL19-47.

64 AR 38 LL5-37.

Post offences

[92] Two days after these events the complainant engaged in a series of text messages with an older man with whom she had had a relationship. The series of text messages progressed to these exchanges:

> Complainant: "A guy fucked me last night I don't willing to."
> Response: "He raped you?"
> Complainant: "I rejected him but he keep doing but I didn't go away I just want him stop."[65]

[93] The texting continued with the older male indicating he was unhappy if she did not talk to a professional. She went on to text:

> "He said he won't have sex with me but then he keeping he won't but put his cock inside me."

[94] Later that day the complainant attended the Royal Brisbane Hospital at which stage she said she had been sexually assaulted and wanted help with the prevention of sexually transmitted diseases or pregnancy as a result. She explained she had what the doctor described as receptive vaginal intercourse – that is, the insertion of the penis into the vagina. The police were contacted.

The appellant's accounts

[95] The police arranged for the complainant to ring the appellant, tape-recording the so-called pretext call. In the course of it, the complainant did not actually suggest to the appellant that he had sexual intercourse with her without her consent. The high point was the following exchange:

> Complainant: "But last Sunday night you say you won't have sex with me but you say you won't and then, but, but you did."
> Appellant: "Hey, because I want to, because I was going away for the week, okay. If I'd seen you during the week I would've waited, but because I was going away for the week, that was to make sure you don't forget about me. Okay. Come on, come on. If that's what you're worried about, don't worry, we won't do anything okay."[66]

[96] While not an admission to a non-consensual sexual encounter, this was implicitly an acknowledgment that the appellant did have sex with the complainant.

[97] There followed a recorded interview by the police with the appellant, during which he admitted that on the "date" in question there had been some cuddling and kissing, but otherwise denied sexual contact beneath her clothing, let alone any acts of penetration or masturbation.

[98] At trial however, the appellant gave evidence admitting the touching and the kissing of the complainant's breasts, digitally penetrating her and having sexual intercourse with her, but he denied that she masturbated him after the sexual intercourse. He explained he had not admitted the whole truth to the police because had had never been in trouble with the police and was frightened, scared and panicked. He asserted the complainant had been an excited, reciprocating participant in the sexual encounter and denied she had at any stage said no.

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65 AR 179.
66 AR 195.

Jury deliberations

[99] The jury retired to consider its verdict at 12.14 pm on day 3 of the trial. At 12.57 pm it conveyed a note to the Court, resulting in the re-reading of most of the complainant's evidence. At 4.08 pm the jury were permitted to go home for the day.

[100] The following day, day 4, the learned trial judge redirected the jury at 10.45 am in response to two notes from the jury which said respectively:

> "Does I don't want, equal no by law.
>
> Definition of consent by law."

[101] A note later emanated from the jury to the effect they were agreed on counts 1, 2 and 5 but having trouble in agreeing on counts 3 and 4. This prompted, at 11.29 am, the giving of a direction crafted for use in such a situation by the High Court in *Black v The Queen*.[67]

[102] The Court resumed with the jury present at 2.52 pm, the jury having provided a note indicating they were agreed on counts 1, 2, 4 and 5 but were in a "stalemate" on count 3. The learned trial judge asked the jury to consider whether there was any prospect of them agreeing 11:1 on count 3 and after the jury conferred briefly they indicated there was no such prospect.

[103] The jury returned at 3.01 pm and returned verdicts of not guilty in respect of counts 1, 2 and 5, guilty in respect of count 4, and was discharged after being unable to reach a decision in respect of count 3.

Ground 1 - Inconsistent verdicts

[104] In light of those mixed results it is no surprise that ground 1 of the appeal is:

> "The verdict of guilty in respect to count 4 is inconsistent with the verdicts of not guilty returned for counts 1, 2 and 5."

[105] This ground requires an appellate court to consider whether the inconsistency complained of requires the conviction to be set aside to prevent a possible injustice.[68] The principles applicable to the consideration of such a ground were authoritatively reviewed by Gaudron, Gummow and Kirby JJ in *MacKenzie v The Queen*.[69] Their Honours explained that where, as here, the inconsistency arises in jury verdicts upon differing counts in the same indictment, "the test is one of logic and reasonableness".[70] They cited with apparent approval[71] the often cited expression of the relevant test by Devlin J in *R v Stone*:[72]

> "He must satisfy the court that the two verdicts cannot stand together, meaning thereby that no reasonable jury who had applied their mind properly to the facts in the case could have arrived at the conclusion, and once one assumes that they are an unreasonable jury,

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67 (1993) 179 CLR 44, 51.
68 *MacKenzie v The Queen* (1996) 190 CLR 348, 368.
69 *MacKenzie v The Queen* (1996) 190 CLR 348, 366-368; affirmed in *MFA v The Queen* (2002) 213 CLR 606, 616-618, 630-631, 634; summarised in *R v GAW* [2015] QCA 166 [18] – [23].
70 *MacKenzie v The Queen* (1996) 190 CLR 348, 366.
71 *MacKenzie v The Queen* (1996) 190 CLR 348, 366.
72 Unreported, 13 December 1954, per Devlin J.

> or they could not have reasonably come to the conclusion, then the convictions cannot stand."[73]

[106] Their Honours cautioned:

> "[T]he respect for the function which the law assigns to juries (and the general satisfaction with their performance) have led courts to express repeatedly, in the context both of criminal and civil trials, reluctance to accept a submission that verdicts are inconsistent in the relevant sense. Thus, if there is a proper way by which the appellate court may reconcile the verdicts, allowing it to conclude that the jury performed their functions as required, that conclusion will generally be accepted. If there is some evidence to support the verdict said to be inconsistent, it is not the role of the appellate court, upon this ground, to substitute its opinion of the facts for one which was open to the jury. In a criminal appeal, the view may be taken that the jury simply followed the judge's instruction to consider separately the case presented by the prosecution in respect of each count and to apply to each count the requirement that all of the ingredients must be proved beyond reasonable doubt. Alternatively, the appellate court may conclude that the jury took a "merciful" view of the facts upon one count: a function which has always been open to, and often exercised by, juries."[74] (citations omitted)

[107] Their Honours agreed with what they described as practical and sensible[75] remarks by King CJ in *R v Kirkman*, which included:[76]

> "Sometimes juries apply in favour of an accused what might be described as their innate sense of fairness and justice in place of the strict principles of law. Sometimes it appears to a jury that although a number of counts have been alleged against an accused person, and have been technically proved, justice is sufficiently met by convicting him of less than the full number. This may not be logically justifiable in the eyes of a judge, but I think it would be idle to close our eyes to the fact that it is part and parcel of the system of administration of justice by juries. Appellate courts therefore should not be too ready to jump to the conclusion that because a verdict of guilty cannot be reconciled as a matter of strict logic with a verdict of not guilty with respect to another count, the jury acted unreasonably in arriving at the verdict of guilty."

[108] On one view such allowance for jury pragmatism would explain virtually any inconsistent set of verdicts but matters of degree are involved. Allowance for a jury's sense of justice ought not blind a court to an apparent possibility of injustice. Appellate intervention will be required, even making due allowance for a jury's sense of mercy, fairness and justice, if such intervention is necessary to prevent a possible injustice. As much follows from the observations of Gaudron, Gummow and Kirby JJ in *MacKenzie v The Queen*, where their Honours explained:

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73 In that test one can recognise the "measure of overlap" noted by Bell, Gageler, Nettle and Gordon JJ in *GAX v The Queen* (2017) 344 ALR 489, 494 between a ground of this kind and a ground that a verdict is unreasonable.

74 *MacKenzie v The Queen* (1996) 190 CLR 348, 367.

75 *MacKenzie v The Queen* (1996) 190 CLR 348, 367, 368.

76 (1987) 44 SASR 591, 593.

> "5. Nevertheless, a residue of cases will remain where the different verdicts returned by the jury represent, on the public record, an affront to logic and commonsense which is unacceptable and strongly suggests a compromise of the performance of the jury's duty. More commonly, it may suggest confusion in the minds of the jury or a misunderstanding of their function, uncertainty about the legal differentiation between the offences or lack of clarity in the judicial instruction on the applicable law. It is only where the inconsistency rises to the point that the appellate court considers that intervention is necessarily required to prevent a possible injustice that the relevant conviction will be set aside. It is impossible to state hard and fast rules. "It all depends upon the facts of the case.""[77]

[109] Turning to the facts here, it ought to be acknowledged at the outset that the jury were told, as is customary,[78] that they needed to consider each charge separately and that their verdicts did not have to be the same on all counts. Further it should be noted that prior to attending upon police the complainant's preliminary complaints only alluded to the act of intercourse without particular mention of the other sexual activity. The respondent submits that may have influenced the jury's level of satisfaction regarding count 4 as compared to the other counts. However, it is not suggested the context of those communications called for descent into detail about the surrounding conduct. Furthermore, it was common ground at trial that most of the charged physical acts not detailed in the preliminary complaints did in fact occur.

[110] In respect of counts 1 and 2 it was alleged, and the appellant accepted, that he touched and applied his mouth to the complainant's breasts. On the complainant's evidence, she repeatedly and unambiguously told the appellant she was not consenting to that behaviour. On the appellant's account, the complainant said no such thing. The factual difference was clear. If the complainant's evidence of her expressly telling the appellant she was not consenting was accepted, it left no room for the jury to harbour a reasonable doubt as to whether or not the appellant honestly and reasonably believed she was consenting.

[111] This was not a case in which there was any room for doubt on the complainant's account about the fact that she did not want the appellant to reach under her clothing and touch or suck her breasts. The only way to reconcile her evidence that she said no to her breasts being touched and sucked, with the jury harbouring a reasonable doubt as to whether the appellant honestly and reasonably believed she was consenting, is that the jury did not accept she had been as unambiguous in saying no as she testified she was. Such reservation about the reliability of the complainant's evidence of her clear communication of non-consent is in stark contrast to the absence of such reservation implicit in the jury's decision to convict on count 4. It is a concerning inconsistency, particularly given the temporal and physical proximity of the events.

[112] The touching of the breasts, the kissing of the breasts and the sexual intercourse did not occur on materially different occasions. They were all part of the same

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77 *MacKenzie v The Queen* (1996) 190 CLR 348, 368. (citations omitted)

78 *KRM v The Queen* (2001) 206 CLR 221, 234.

allegedly unwanted sexual encounter inside the appellant's car. On the complainant's account she was saying "no" throughout. There was no reasonable basis to infer she did not mean it throughout. If there was reasonable doubt about her evidence as to the fact she said no in respect of counts 1 and 2 then it is difficult to understand why that reasonable doubt was likewise not present as to that fact in respect of count 4.

[113] The jury's acquittal of the appellant on count 5 materially exacerbates the concerns arising from the contrasting verdicts on counts 1, 2 and 4. Count 5, the alleged procuring of the act of masturbation of the appellant's penis contrary to the will of the complainant, occurred soon after what the jury purportedly found was an act of penile rape. It will be recalled the appellant maintained his denial of the act of masturbation. Importantly, the defence of mistake of fact did not go to the jury in respect of this charge. The issues on count 5 were whether it happened at all and, if so, whether it happened without the consent of the complainant.

[114] It is difficult to see how the jury could have doubted the complainant's claim the act of masturbation happened if they had been sufficiently confident in the complainant's reliability to have convicted the appellant of raping her by penile penetration a short time earlier. There will be some situations in which a jury accepts a complainant is truthful but thinks the complainant is genuinely mistaken as to a particular fact. Count 5 does not involve such a situation. The complainant could not conceivably have been mistaken about the fact she grasped the appellant's penis and masturbated him. This was not a case involving the retrieval in adulthood of some long-suppressed memory of sexual misconduct involving the possibility of some historical contamination of the complainant's memory or psyche. There was no room here for entertaining the possibility the complainant was honestly recalling an imagined event.

[115] If the jury entertained a reasonable doubt about the complainant's assertion that the act of masturbation happened, it must have been because they entertained a reasonable doubt she was telling the truth. If the jury entertained a reasonable doubt of the complainant's truthfulness about the commission of such a significant act by the appellant against her, it is difficult to see how they would not likewise have entertained a reasonable doubt about another significant aspect of her evidence, namely that she had clearly indicated her absence of consent to sexual intercourse. Yet for the verdict of guilty on count 4 to have been arrived at correctly, with the defence of honest and reasonable mistake of fact being correctly excluded, the jury could not have harboured any such doubt.

[116] On the other hand, if the jury accepted the act of masturbation did occur, their failure to convict of sexual assault in respect of that incident can only have meant they harboured a reasonable doubt about whether it occurred without the complainant's consent. On the complainant's account, she performed the act of masturbation out of fear that if she did not, she would be the subject of a further penile rape. How could the jury have reasonably doubted her about that if they accepted she had just been raped? The learned sentencing judge explained the definition of consent to the jury, including that consent is not freely or voluntarily given if obtained by threats or fear. If the jury did believe the complainant as to the act of masturbation having occurred, they must have harboured a reasonable doubt about her explanation that she performed the act non-consensually, induced to do so by the fear that, if she did not, she would be raped again. Could a jury acting

reasonably think a woman who had just been vaginally raped would freely and voluntarily choose to pleasure her rapist by masturbating him? Surely not.

[117] For the jury to have harboured a reasonable doubt whether the masturbation by the complainant occurred or alternatively a reasonable doubt whether the complainant did not freely and voluntarily consent, was irreconcilable with its purported satisfaction beyond a reasonable doubt that the complainant had been raped.

[118] When the features underlying the mixture of verdicts in this case are considered collectively, it is impossible to avoid the conclusion that the combination of verdicts returned are an affront to logic and common sense. The acquittals on counts 1, 2 and 5 compel the conclusion the jury, if acting reasonably, should have harboured a reasonable doubt as to the appellant's guilt of count 4.

[119] It will be apparent the foregoing conclusion has been reached without regard to the fact the jury were unable to reach any verdict on count 3, the act of digital penetration. That is because a failure to agree on a verdict is not logically relevant to whether verdicts returned are inconsistent.[79] However, the failure to agree does have relevance to an attempt by the respondent to attempt to justify the inconsistent verdicts as a product of jury pragmatism.

[120] Looking for a solution amidst its folly of having indicted so many charges, the respondent submitted the jury may have thought the prosecution "overcharged and corrected that by returning [a] guilty verdict on the charge that represented the culmination of the one transaction".[80] The effect of such a submission is that the jury applied its innate sense of justice and fairness and decided to take a global approach to the indicted charges and only convict on the most serious one. But the fact the jury were unable to agree on all the indicted charges demonstrates it must not have decided to take such a global approach to the indicted charges. Further to that obstacle, convicting the appellant of the most serious charge against him was hardly redolent of mercy.

[121] In any event, reasonable allowance for a jury's pragmatic sense of justice, fairness or mercy could not satisfactorily dispel the appearance of likely injustice arising here. The inevitable conclusion in light of the acquittals on counts 1, 2 and 5 is that the jury could not reasonably have come to a conclusion of guilt on count 4.

[122] The combination of verdicts, given the facts and conduct of the case, compels the conclusion there was a compromise of the performance of the jury's duty and that this Court's intervention is necessarily required to prevent injustice. The conviction of the appellant on count 4 should be quashed.

[123] As to whether a retrial should be ordered or a verdict of acquittal entered, in *MacKenzie v The Queen*, Gaudron, Gummow and Kirby JJ, in observing the appropriate relief depends upon the facts of the case, noted:

> "It may be appropriate to enter a verdict of acquittal on the subject count(s) on the footing that this merely carries forward the logic of the other acquittal verdict(s)."[81]

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79 See for example *Osland v The Queen* (1998) 197 CLR 316, 406; *R v R,GJ* (2009) SASR 506, 517; cf *Pillay v The Queen* (2014) 43 VR 327.

80 Respondent's Outline of Submissions [11].

81 (1996) 190 CLR 348, 368.

[124] As explained above, the acquittals in this case on counts 1, 2 and 5 mean the jury could not reasonably have come to the conclusion of guilt on count 4. It thus carries forward the logic of the acquittal verdicts to enter a verdict of acquittal in respect of count 4.

[125] Ground one having succeeded, the conviction on count 4 should be quashed and a verdict of acquittal entered.

Ground 2 - Lies

[126] Ground 2 of the appeal is:

> "The learned trial judge erred in not providing directions or warnings as to the use [to which] the jury might put lies told by the appellant other than those in his interview with police."

[127] As earlier explained, the appellant lied in his recorded interview with police, claiming that there was no touching beneath the clothing. The earlier quoted passage from the pretext call and, more particularly the appellant's evidence at trial, clearly shows he lied in the interview when denying the acts of touching and kissing the complainant's breasts under her clothing, digitally penetrating her and then penetrating her vagina with his penis. In respect of those lies, the learned trial judge gave the so-called *Edwards* direction,[82] consistently with the direction suggested in the Queensland Supreme and District Courts Criminal Directions Benchbook, as to the requirements to be met before the jury could use the lies as evidence of consciousness of guilt.

[128] The difficulty with which the present ground is concerned arises from another set of lies, exposed and relied upon as significant by the learned Crown Prosecutor at trial. They were the lies the appellant told the complainant in endeavouring to cultivate a relationship with her. He told her he was an engineer, but he was a truck driver. He told her he finished with his last girlfriend about 12 months ago, but he lived at the same residence as his estranged wife and child. He lied about what suburb his home was located in.

[129] The learned Crown Prosecutor put to the appellant in cross-examination that he deliberately chose not to tell the complainant the truth of his living situation because he wanted her to believe that he was available for a relationship. Later in cross-examination it was put to him he had convinced her to go out with him. Later still it was put that he wanted to exploit her eagerness to have a serious relationship. In reference to the physical acts attracting the charges, it was put by the learned Crown Prosecutor that he was then exploiting the complainant for his own sexual purposes.

[130] These features of the matter played into the following submissions in the course of the learned Crown Prosecutor's address:

> "Now, Mr Lennox's evidence, I would suggest, you would find troubling. That's my argument to you, both how he gave evidence but – the lies he said to police but also the lies he then said to [the complainant] when he met her, so the entire way he's conducted himself. So when he met [the complainant], he lied about his job. He told her she was – he was an engineer. He drove to his home, and he lied about the suburb they were in. He never told her he was

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82 *Edwards v The Queen* (1993) 178 CLR 193.

> married, and, all right, he's come to court and said "Well, I was separated", but don't forget he did tell her about – he said he's been in a – he said – I'm sorry. This is his evidence:
>
> "*I finished with my last girlfriend about 12 months ago, haven't had a serious relationship for 12 months.*"
>
> Okay. He said something in evidence about being separated for 10 years, I'm not sure something, but the way he proposed himself or presented himself to [the complainant] is curious, you might think. He's not telling her he's married but separated, not telling her that his wife lives with him, not telling her about the child. Okay. He's lying about his job, and he's lying about his living arrangements. And you've heard that [the complainant] was, it seems, quite forthright in terms of what she was after. She was looking for someone – a relationship. She was looking for someone to take care of her.
>
> Then you look at his lies. You look at how she – what she was saying she was after and you look at what he lied about just in meeting her. He's an engineer. He's single. He owns his own house. He had a girlfriend. So implicit in that he's a free agent, nothing about children. And you heard even the way he was organising the date over the 48 hours. It seemed to imply that he was [hard working]. He had a lot on. And you might think there is a trick to what he was saying to her. This is a woman he's met who he knows wants someone to take care of her, and he's answering a lot of those criteria through what he's telling her which have turned out to be lies. So he's manipulating her and presenting himself in a way that isn't true, and so this is the personality he presented himself as to [the complainant]." (emphasis added)

[131] The learned Crown Prosecutor then went on to remind the jury of the way in which the appellant had lied in his interview with police.

[132] At a stage of the trial prior to the appellant giving evidence, the learned Crown Prosecutor indicated to the learned trial judge that she proposed to submit the lies told by the appellant to the police were relevant not just to his credibility, but also as evidence of consciousness of his own guilt.[83]

[133] Prior to the commencement of addresses the next day, the following exchange occurred:

> "DEFENCE COUNSEL: Your Honour, just one very brief thing. I wondered if, and we didn't discuss it yesterday afternoon, a credit lies direction will also need to be added.
>
> HER HONOUR: A what?
>
> DEFENCE COUNSEL: A credit lies direction because of the questions about those other lies in his cross-examination.
>
> HER HONOUR: What do you say? Do you want to confuse the jury?
>
> DEFENCE COUNSEL: I know.

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[83] AR 118.

> HER HONOUR: The stronger direction is lies going to a consciousness of guilt.
>
> DEFENCE COUNSEL: Yes.
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> HER HONOUR: I think if I give them two different directions on how to deal with lies, they're going to have trouble with that. They've got [to] work out then which lies they do – which direction – sorry – which lies they follow the direction on. And the stronger one, don't you agree, is the one---
>
> DEFENCE COUNSEL: Yes.
>
> HER HONOUR: ---going to consciousness of guilt. I think we'll leave it at that.
>
> DEFENCE COUNSEL: Okay. Thank you, your Honour.
>
> HER HONOUR: So what lies are you talking about?
>
> DEFENCE COUNSEL: He was cross-examined about---
>
> HER HONOUR: Lies in the record of interview or---
>
> DEFENCE COUNSEL: No. About his marital situation, about not telling her, [the complainant], that the house – other – a couple of other things. I only assumed that the Crown will [indistinct].
>
> HER HONOUR: No. I think the stronger direction and the better one for him, the most impact for him, is the lies going to a consciousness of guilt and he'll get the benefit of that.
>
> DEFENCE COUNSEL: Yes. And, your Honour, I'll formally close our defence case as well.
>
> HER HONOUR: When they come in, yes."[84]

[134] In light of the above exchange, the respondent's submission on the hearing of this appeal that there was a failure to seek a direction about lies going to credit is unsustainable. Defence counsel might have been more robust in seeking the direction and in confronting the learned trial judge's views on the topic. However, it is clear the need for the direction was raised before, and considered and rejected by, the learned trial judge.

[135] There is no rigid rule as to when a direction about an accused's lies relevant only to credit is required. Whether it is will depend upon the potential for a risk of misunderstanding on the part of a jury as to the significance of possible lies and the use to which they may be put.[85]

[136] It is not apparent why the learned judge considered the giving of the direction would be confusing to the jury. The category of the appellant's lies to the police as to the fact that sexual activity had occurred ("the lies to police") was readily distinguishable from the category of the defendant's lies to the complainant about his personal life circumstances ("the lies to the complainant"). The respective difference in the use to which each of those categories of lies could be put by the jury was readily explicable. The lies to police could, subject to the satisfaction of

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84 AR 168, 169.

85 *Zoneff v The Queen* (2000) 200 CLR 234, 244-245.

the *Edwards* test, potentially be used by the jury as evidence of the appellant's consciousness of guilt of the criminal conduct charged, whereas the lies to the complainant could not be used in that way and were only relevant to the jury's consideration of the credibility of the appellant's accounts.

[137] It is also not apparent why her Honour considered the direction sought would be against the interests of the appellant. Perhaps it was thought the direction would elevate the importance the jury would attach to the lies the appellant told the police, but the *Edwards* direction imposes its own strong requirements protecting the charged citizen against improper reliance upon the lies to which it relates. There was actually a much more real and concerning risk arising from the absence of the direction sought.

[138] In proceeding to direct the jury about the use to which they could put the lies to the police, the learned trial judge was silent on the other category of lies about which much had been made in the address to the jury of the learned Crown Prosecutor. There was nothing wrong with the prosecutor cross-examining on and addressing about both categories of lies. However, so much having been made of both categories of lies, the risk in the jury being told by the Judge they could make potentially positive use of the appellant's lies to the police was that they might wrongly use the appellant's lies to the complainant in a similar way.

[139] That risk was exacerbated by the lies to the complainant being so closely connected with the offending, in the sense that they were the deceptive means by which the appellant so inveigled his way into the complainant's trust that she was alone with him in a parked car on the night of the alleged offences. There was a real risk of the jury taking that connection a step further and misusing the appellant's deceptive cultivation of the relationship as circumstantially evidencing his guilt.

[140] It was not an adequate safeguard against these risks to merely identify the lies which the *Edwards* direction was given about but remain silent about the other category of lies. Instead the jury should have been directed about the limited use to which the lies to the complainant could be put, including that they could not be used as potential evidence of guilt. The learned trial judge erred in not so directing.

[141] Ground 2 has therefore also succeeded. It provides a further basis for quashing the conviction on count 4.

Ground 3 – Reading of the complainant's evidence without directions, warnings or re-reading of the appellant's evidence

[142] Ground 3 is:

> "That a miscarriage of justice occurred due to the jury being read a transcript of the evidence of the complainant during their deliberations:
>
> a. without any directions or warnings as to its use; and/or
>
> b. without also reading the evidence of the appellant or providing a summary or reminder of the evidence given by the appellant at trial." …

[143] Less than an hour after retiring, the jury asked, "to hear the complainant's evidence". The learned trial judge proceeded to bring the jury back and read the transcript of the complainant's evidence to the jury, at times paraphrasing some sections.

[144] Neither counsel submitted against the taking of this course. Indeed, after it occurred, and the jury retired again, defence counsel pointed out the learned trial judge had accidentally missed a section of transcript and the jury were brought back for that section to be read. No submission at all was made that any directions or warnings arising from this exercise were required. Nor were any submissions made requesting any reminder be given of the appellant's evidence at trial.

[145] This was not a category of case like child sex cases, in which the mode of evidence called for some greater than normal caution to ensure fairness to an accused in dealing with a jury request of this kind.[86] That is not to suggest that special caution might not be required in other categories of cases. The degree of caution required in dealing with such a request will inevitably depend upon the circumstances of the case. However, there was nothing about the particular circumstances of this case to suggest the learned trial judge should have done anything other than assist the jury in meeting its request. Her Honour did not err in doing only that.

[146] Ground three must fail, although that conclusion is academic to the fate of the appeal.

Attorney's appeal

[147] In light of the above conclusions the conviction will be quashed and the sentence imposed below will thereby become a nullity. This renders the Attorney-General's appeal against sentence otiose. It should be dismissed.

Orders

[148] I would order:

1. Appeal allowed.
2. Conviction on count 4 quashed.
3. Verdict of acquittal on count 4 entered.
4. Attorney-General's appeal against sentence dismissed.

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[86] See for example *Gately v The Queen* (2007) 232 CLR 208 and the recent review of the authorities in *R v LAK* [2018] QCA 30.